No. 97-889

Supreme Court, U.S.
FILED
MAY 7 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

—v.—

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTH CAROLINA, IN SUPPORT OF PETITIONER

Steven R. Shapiro
Lewis Maltby
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Louis M. Bograd
(*Counsel of Record*)
American Civil Liberties Union Foundation
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-1817

C. André Brummé III
ACLU of South Carolina Foundation
1338 Main Street
Columbia, South Carolina 29201
(803) 799-5151

David S. Schwartz
ACLU Foundation of Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of South Carolina is one of its state affiliates. Since its founding in 1920, the ACLU has vigorously supported the right of workers to organize collectively and to bargain through their union regarding the terms and conditions of employment. At the same time, the ACLU has also vigorously supported the enactment and enforcement of the major federal civil rights statutes that are designed to end discrimination in employment. Because the decision below purports to address both of these interests, it involves issues of critical importance to the ACLU and its members.

More specifically, *amici* believe that the decision below fundamentally misconceives the relationship between statutory rights -- such as the protection against discrimination on the basis of disability that is at issue in this case -- and the role of collective bargaining in the workplace. The rights and remedies provided by Congress in the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, and other similar statutes, belong to each individual worker. They are not derived from the collective bargaining agreement and cannot be altered or waived as part of the negotiation be-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

tween the union and the employer. The decision to submit to mandatory arbitration is most properly understood as a waiver of the employee's statutorily conferred right to a judicial forum and trial by jury. Such waivers can and should be upheld only if they are knowing, intelligent and voluntary, and are made by the individual rightholder. *Amici*'s position in this case is therefore consistent with the position that we have taken in numerous other cases involving the asserted waiver of individual rights. It is also an approach, in our view, that would bring needed clarity to an area of the law that remains quite confused.

STATEMENT OF THE CASE

Ceasar Wright is a longshoreman in the Port of Charleston, South Carolina. He has worked for a number of shipping companies through the hiring hall operated by Local 1422 of the International Longshoreman's Association (ILA). In 1992, he was injured on the job and, for a time, was disabled and unable to work as a longshoreman. Mr. Wright negotiated a settlement of his workers' compensation claims in 1994.

Mr. Wright's condition eventually improved and his physician determined that he was physically able to resume work. In January 1995, he returned to the hiring hall for work assignments and successfully performed work for four of the respondent employers. Nevertheless, on January 11, 1995, the respondents agreed that they would refuse to hire Mr. Wright on the ground that his earlier workers' compensation settlement meant that he was no longer qualified to perform longshore work of any kind." Joint Appendix, at 35a.

Mr. Wright consulted with the president of his union local. Although the union by letter protested the decision to refuse to accept Mr. Wright for work as a violation of the

ADA and the collective bargaining agreement, the union did not file a grievance on Mr. Wright's behalf. Instead, the union recommended that he retain private counsel to pursue a statutory ADA claim.

Mr. Wright filed timely charges of discrimination with the Equal Employment Opportunity Commission and, after receiving a Notice of Right to Sue on each charge, filed the present action. In a motion for summary judgment, the respondents asserted that the district court could not hear Mr. Wright's claim because he had failed to invoke the grievance procedure under the ILA's collective bargaining agreement.[2] The district court dismissed the suit without prejudice for want of jurisdiction. The district court based its ruling on the Fourth Circuit's prior decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 432 (1996). In *Austin*, the Fourth Circuit had ruled that an applicable labor arbitration agreement "ousts a court of jurisdiction," *id.* at 878 n.1, to hear statutory claims of discrimination brought by individual employees. The Fourth Circuit affirmed the district court's ruling in Mr. Wright's case (also on the basis of *Austin*), and Mr. Wright timely petitioned for a writ of *certiorari*.

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[2] The contract between the South Carolina Stevedores Association and the International Longshoremen's Association, Local #1422 provides: "this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment . . . ." Joint Appendix, at 45a-46a. The grievance and arbitration procedure set forth in the collective bargaining agreement applies to "matters under dispute between the parties." Petition for *Certiorari*, at 5.

SUMMARY OF ARGUMENT

The issue before this Court is not whether arbitration is a useful or desirable alternative in individual civil rights cases. Depending on the nature of the claim and its value to the parties, arbitration may well be an attractive option in particular circumstances. The issue before this Court is an earlier and more fundamental one. Who has the right to make the decision whether a statutory civil rights claim *must* be arbitrated?

Contrary to the court below, *amici* believe that a decision to submit all such claims to arbitration can *only* be made by the individual employee whose rights are at issue and not by the union as part of a collective bargaining agreement. The decision to pursue arbitration is a decision to forego a judicial forum and the right to trial by jury. Such important rights can be waived but here, as elsewhere, personal rights can only be waived by the person affected. Moreover, the burden is on those asserting the waiver to establish that the waiver was knowing, intelligent, and voluntary.

In a series of important federal statutes, Congress has banned employment discrimination on the basis of race, gender, national origin and disability. The right to be free from discrimination is an individual right that belongs to each worker regardless of whether or not there is a collective bargaining agreement. Consequently, the collective bargaining agreement cannot alter or modify the right of each individual worker to pursue a federal employment discrimination claim in federal court. What Congress has granted in this regard, the union may not negotiate away. Indeed, that is precisely what this Court unanimously held in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), when it ruled that an individual employee's right to take his claim to court under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§2000e, could not be waived by his union through a mandatory arbitration agreement.

The decision below is irreconcilable with *Alexander* and must be reversed on those grounds alone. The Fourth Circuit's view that *Alexander* has been eroded by subsequent developments misstates both its own authority and the prevailing law. As the Court just recently reiterated in *Agostini v. Felton*, 521 U.S. ___, 117 S.Ct. 1997 (1997), the lower courts are bound to follow this Court's controlling precedents unless and until this Court says otherwise. Moreover, in the twenty-four years since it was written, *Alexander* has in fact been reaffirmed by this Court on six different occasions, twice cited approvingly by Congress, and faithfully applied by every other circuit to address the issues raised by this case.

The specific error committed by the Fourth Circuit is thus easily corrected. But, unfortunately, the rationale adopted by the Fourth Circuit reflects a more general confusion among the lower courts about the meaning and significance of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). While the Fourth Circuit stands alone in construing *Gilmer* to permit a union to waive the statutory rights of its members, the view that *Gilmer* requires the courts to uphold virtually any predispute arbitration agreement signed by the individual employee is far more widespread. This broader misunderstanding of *Gilmer* lies at the heart of the Fourth Circuit's erroneous decision in this case. Accordingly, we urge this Court to use this opportunity to address the underlying confusion surrounding *Gilmer* by clearly holding that a predispute arbitration agreement will only be upheld if it represents a knowing, intelligent, and voluntary waiver by the individual employee of the right to a judicial forum and jury trial. Unlike the Fourth Circuit, we believe that *Gilmer* and *Alexander* are entirely consistent. Unlike many of the lower courts, we also believe that

Gilmer and *Alexander* can both be read in a way that is consistent with general waiver principles.

Finally, nothing in the legislative history of the ADA or the 1991 Civil Rights Act[3] even remotely suggests that general waiver principles should not apply in this context. To be sure, both acts authorize the use of arbitration and other forms of alternative dispute resolution as a voluntary supplement to judicial enforcement. For present purposes, however, it is more significant that Congress expressly rejected an amendment to the 1991 Civil Rights Act that would have encouraged arbitration "in place of judicial resolution." More generally, the legislative history of the 1991 Civil Rights Act provides clear evidence that Congress opposed "coercive attempts to force employees in advance to forego statutory rights." *See generally Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1998 U.S. Dist. LEXIS 877 (D.Mass. 1998). Thus, contrary to the view of the court below, these congressional enactments lend further support to the proposition that any waiver of a right to a judicial forum for adjudication of statutory civil rights claims must be knowing, intelligent, and voluntary.

In short, the resolution of this case does not require the articulation of a new legal theory. Properly understood, this is a case about waiver that can be resolved by applying the Court's traditional waiver doctrine.

[3] The Civil Rights and Women's Equity in Employment Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991).

ARGUMENT

A UNION'S AGREEMENT TO PREDISPUTE ARBITRATION IN A COLLECTIVE BARGAINING AGREEMENT DOES NOT OVERRIDE THE STATUTORY RIGHT OF INDIVIDUAL EMPLOYEES TO PURSUE THEIR EMPLOYMENT DISCRIMINATION CLAIMS IN FEDERAL COURT

A. The Decision To Arbitrate Statutory Discrimination Claims Represents A Waiver Of Important Federal Rights That Can Only Be Upheld If It Is Knowing, Intelligent, And Voluntary

The right of an individual employee to bring an employment discrimination case in court, and have any damages claim resolved by a jury, has both statutory and constitutional dimensions. The plaintiff's cause of action obviously derives from statute,[4] but the right to have that claim adjudicated pursuant to fair procedures and to have a jury find the relevant facts is rooted in the Constitution. *See Hetzel v. Prince William County, Virginia*, ___ U.S. ___, 118 S.Ct. 1210 (1998)(plaintiff has Seventh Amendment right to jury trial for her Title VII claim).

These rights can, of course, be waived. But in comparable settings, the Court has repeatedly stressed that a valid waiver must rest on "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). Although the generally accepted standard of knowing, intelligent, and voluntary waivers was

[4] If the plaintiff is a government employee, the right to be free from employment discrimination will also have a constitutional dimension under the Fifth and/or Fourteenth Amendments. *See, e.g., Davis v. Passman*, 442 U.S. 228, 236 (1979).

originally developed in the context of criminal proceedings, *see, e.g., id.* (waiver of right to counsel in criminal proceeding); *McCarthy v. United States*, 394 U.S. 459 (1969)(waiver of right to jury in criminal trial must be knowing and voluntary), this Court has consistently applied the same test to the waiver of fundamental rights in civil proceedings. *See Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972)(finding no waiver of procedural due process right to predeprivation hearing); *D.H. Overmyer Co. v. Frick*, 405 U.S. 174, 187 (1972)(contractual waiver of due process rights must be "voluntarily, intelligently, and knowingly" made). In the civil arena, just as in the criminal, courts "'do not presume acquiescence in the loss of fundamental rights,' . . . [and] 'indulge every reasonable presumption against waiver.'" *Fuentes*, 407 U.S. at 94, n.31 (quoting *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937), and *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).[5]

[5] Of particular relevance to this case, a number of lower courts have expressly applied the knowing, intelligent, and voluntary standard to purported waivers of the right to jury trial in private contractual agreements. *See National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977)(provision of "equipment lease" agreement whereby lessee waived trial by jury did not constitute knowing and intentional waiver where it was buried in eleventh paragraph of fine print, 16-clause agreement); *Luis Acosta, Inc. v. Citibank, N.A.*, 920 F.Supp. 15 (D.P.R. 1996)(jury waiver clause in bank customer's factor's lien agreement was not knowing and voluntary where waiver clause was not prominently set forth but buried at end of contract and no evidence was presented that waiver provision was specifically negotiated between parties); *Whirlpool Financial Corp. v. Sevaux*, 866 F.Supp. 1102 (N.D. Ill. 1994)(promisor's alleged waiver of right to jury trial in promissory note was not knowing and voluntary where, *inter alia*, terms of note were drafted by promisee's counsel, parties never discussed waiver provision in note, provision was not so conspicuous as to insure knowing and voluntary waiver, and promisor was not represented by counsel with regard to execution of note); *Connecticut Nat'l Bank v. Smith*, 826 F.Supp. 57 (D.R.I. 1993). (continued...)

Therefore, the burden is on the party seeking to assert a waiver of rights to establish that the waiver was knowing, intelligent, and voluntary.

Amici submit that precisely the same knowing, intelligent, and voluntary standard should apply to purported predispute waivers of the right to a judicial forum for individual statutory employment discrimination claims. Yet, with the partial exception of the Ninth Circuit, the lower courts have consistently failed to test purported arbitration agreements against this well-established standard.[6] Application of the waiver standard would not only resolve the instant case, but would provide much needed guidance to the lower courts.[7]

[5] (...continued)
If a contractual waiver of a right to trial by jury is only valid when knowingly, intelligently, and voluntarily made then, *a fortiori*, a mandatory predispute arbitration provision must be subject to the same standards because it constitutes a waiver not only of the injured employee's right to trial by jury, but also of the right to a judicial forum at all.

[6] Even the Ninth Circuit's reliance on the waiver doctrine has been limited. In a series of recent cases, the circuit has simply held that an employee must, at the very least, know that a contractual arbitration provision applies to statutory claims in order for the court to enforce the provision as a waiver of the right to a judicial forum. *See Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995); *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997).

[7] Without a meaningful waiver standard, courts will be obliged continually to police the particular arbitration procedures imposed by thousands of different employment contracts in order, in each case, to determine whether the procedures employed provide sufficient due process protections to the individual employee to further the national policies embodied in the applicable substantive statute. By refusing to enforce purported arbitration provisions unless it can be demonstrated to the court's (continued...)

B. A Mandatory, Predispute Arbitration Provision In A Collective Bargaining Agreement Does Not Constitute A Valid Individual Waiver Of Statutory Rights Against Employment Discrimination

This Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, and its progeny, can best be understood as a particularized application of the requirement that a valid waiver of the right to a judicial forum for the adjudication of a statutory civil rights claim must be knowing, intelligent, and voluntary. Collective bargaining agreements are negotiated between employers and unions, not individual employees. Our national labor policy authorizes unions to act on behalf of employees in furtherance of their collective interests, and generally requires employees to defer to the judgment of the majority of the union's members. However, as this Court recognized in *Alexander*, that general rule does not apply when Congress provides individual workers with statutory protection against employment discrimination. Unions are not free to negotiate away these statutory rights because the right belongs to the individual employee. Many collective bargaining agreements contain mandatory arbitration provisions, and those provisions are legally unobjectionable if they are limited to disputes arising from the collective bargaining agreement itself. But the union has no authority, in the collective bargaining agreement or elsewhere, to waive the right of individual employees to pursue their statutory civil rights claims in court. Any purported

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[7] (...continued)
satisfaction that an individual employee waived his right to a judicial forum voluntarily, and with full knowledge of the implications of that decision, courts can avoid the necessity of embroiling themselves in the myriad variety of private arbitration agreements currently extant.

waiver contained in the collective bargaining agreement cannot be attributed to an individual employee who did not, in fact, knowingly and voluntarily agree to it.

The principle that a union cannot waive an individual employee's statutory rights against employment discrimination was clearly central to the Court's ruling in *Alexander*. The unanimous opinion by Justice Powell stressed precisely this point in explaining the relationship between Title VII and the collective bargaining agreement:

> To begin, we think it clear that there can be no prospective waiver [through a collective bargaining agreement] of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of collective bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. at 51 (citations omitted).

Several years later, the Court reiterated the same principle in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). The dispute there involved the application of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* Once again, the Court held that the individual employee could not be precluded from raising his claim in court, notwithstanding the existence of an arbitration provision in the collective bargaining agreement:

> Two aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when the parties to a collective bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures . . . .

450 U.S. at 734-35. Elaborating on this "tension," the Court explained:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers . . . .

Id. at 737. Ultimately, the Court concluded:

> [The] rights petitioners seek to assert in this action are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable.

Id. at 745.

Underlying the Court's holding in *Barrentine* was the recognition that "the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work[.]'" *Id.* at 739 (emphasis in original)(internal citation omitted). The significance of the Court's highlighting is clear. Because individual employees are not parties to the collective bargaining agreement, the collective bargaining agreement does not (and cannot) waive the individual's right to litigate statutory claims in court.

In an unbroken line of rulings over the past two decades, this Court has reaffirmed the rulings in *Alexander* and *Barrentine*, extended their reasoning to cover all individual employee protective statutes, and reiterated this essential rationale. *See McDonald v. City of West Branch*, 466 U.S. 284 (1984)(applying *Alexander* and *Barrentine* to causes of action under 42 U.S.C. §1983); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 n.8 (1985)(*Alexander* distinguished between National Labor Relations Act rights, conferred on employees collectively, "which could be waived by contract between the parties" and "an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement"); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564 (1987)("This Court has, on numerous occasions, declined to hold that individual employees are, because of

the availability of arbitration, barred from bringing claims under federal statutes . . . . [T]he theory running through [*Alexander*, *Barrentine*, and *McDonald*] is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers'")(internal citation omitted); *Gilmer*, 500 U.S. at 35 (reaffirming *Alexander*, *Barrentine*, and *McDonald* and noting that an "important concern" in those cases "was the tension between collective representation and individual statutory rights"); *Livadas v. Bradshaw*, 512 U.S. 107, 128 n.21 (1994)(noting that one important distinction between *Gilmer* and *Alexander* was the concern in *Alexander* that "in collective-bargaining arbitration, 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit'")(internal citation omitted).[8]

[8] A secondary concern running through these decisions arises from the fact that, under most collective bargaining agreements, a decision whether to pursue a grievance to arbitration rests with the union, rather than the injured employee. Therefore, unlike the situation in *Gilmer*, there is no assurance that the employee's case will ever be heard by an arbitrator. *Cf. Alexander*, 415 U.S. at 58 n.19 ("A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented"); *Barrentine*, 450 U.S. at 742 ("Even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration"); *McDonald*, 466 U.S. at 291 ("The union's interests and those of the individual employee are not always identical or even compatible"). Discrimination claims are particularly likely to present a conflict between the interests of the injured employee and the union membership as a whole because remedies for the employee may be perceived to come at the expense of other employees. *Cf. Alexander*, 415 U.S. at 58 n.19 ("harmony of interest . . . cannot always be presumed, especially where a claim of racial discrimination is made"). For these reasons, as well, the union cannot be seen (continued...)

Amici urge the Court to reaffirm this consistent line of precedent. Specifically, this Court should hold that an arbitration provision in a collective bargaining agreement cannot waive an individual employee's right to a judicial forum to litigate statutory civil rights claims because the adoption of such a provision through the collective bargaining process does not constitute a knowing, intelligent, and voluntary waiver of the right to a judicial forum by the individual employee rightholder.

C. The Court Below Erred In Construing *Gilmer* To Mandate Enforcement Of Arbitration Agreements That Are Not Knowing And Voluntary

In *Gilmer*, 500 U.S. 20, this Court enforced a provision in a securities registration agreement that required the plaintiff to arbitrate his statutory claim under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Many lower courts, including the Fourth Circuit in this case, have interpreted *Gilmer* as virtually requiring them to enforce contractual arbitration provisions with regard to statutory civil rights claims, regardless of the language of the provision or the circumstances under which it was adopted. The position of the Fourth Circuit undeniably carries the error farther than other lower courts by totally ignoring any possible distinction between individual employee contracts and collective bargaining agreements, and thus treating *Alex-*

[8] (...continued)
as a proxy for the individual employee in deciding whether to pursue a statutory discrimination claim through arbitration rather than litigation.

ander as though it had been overruled by *Gilmer*.[9] The decision below nonetheless reflects a more broadly held misconception about the meaning of *Gilmer* that this Court should now correct.

Specifically, there is nothing in *Gilmer* that is inconsistent with the traditional waiver standard advocated in this brief or that can fairly be read as holding that even nonnegotiable arbitration clauses imposed as a condition of employment must be enforced. The narrow facts of *Gilmer* simply do not support such an expansive interpretation of the Court's language. Among other things, there does not appear to have been any dispute in *Gilmer* that the arbitration provision at issue was applicable to statutory discrimination claims. The majority in *Gilmer* pointed to this as one important factor distinguishing the case from *Alexander* and its progeny: "[T]hose cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." 500 U.S. at 35.

More importantly, this Court stressed that Gilmer, a corporate manager of financial services, was an "experienced businessman," who was capable of assessing the consequences of his contractual commitments. *Id.* at 33. The Court found no evidence that he had been "coerced or defrauded into agreeing to the arbitration clause in the registration application." *Id.* In the Court's view, Gilmer was someone who had knowingly and voluntarily "'made the bargain to arbitrate,' . . . [and therefore] 'should be held to it.'" *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

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[9] Just last Term, this Court cautioned the lower courts about assuming that "our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 117 S.Ct. at 2017.

The *Gilmer* Court recognized that there would often be unequal bargaining power between employers and employees, which might affect the validity of an arbitration agreement. 500 U.S. at 33. But because the Court did not believe that Gilmer himself had suffered the effects of unequal bargaining power, it had no occasion to consider what the legal import of that inequality might be. Lacking an appropriate record, it is hardly surprising that the Court declined to adopt a *per se* rule invalidating all contractual arbitration provisions.[10] That judicial restraint hardly justifies the conclusion that the Court in *Gilmer* intended to give a green light to employers who use their superior bargaining power to impose mandatory arbitration provisions on their employees as a nonnegotiable condition of employment. As discussed below, such agreements cannot be upheld without stripping the waiver doctrine of all practical meaning. *See* p.20, *infra*.

In applying *Gilmer* (and *Alexander*), lower courts should be instructed to consider whether an agreement to arbitrate employment disputes constituted a knowing, intelligent, and voluntary waiver of the employee's individual right to a judicial forum and a jury trial for the adjudication of statutory discrimination claims. Although the arbitration agreement in *Gilmer* might have survived this scrutiny, many other mandatory arbitration provisions will not.[11]

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[10] "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are *never* enforceable in the employment context." *Id.* (emphasis added).

[11] One need not quarrel with *Gilmer*'s refusal to adopt a *per se* rule against all arbitration agreements in the employment context to recognize that there are a number of recurring fact patterns that may well justify a *per se* rule against the enforceability of arbitration agreements in specified circumstances. Among the more troubling scenarios discussed below are situations where the employee never agreed to the arbitration

(continued...)

This reminder is unfortunately necessary because the lower courts have gone seriously astray in construing *Gilmer* to require enforcement of arbitration agreements even when imposed as an involuntary or unknowing condition of employment. Moreover, by misreading *Gilmer*, the lower courts have felt free to ignore the undeniable fact that many employees confronted with a predispute arbitration agreement are simply not in a position to know or understand the significance of the right to a judicial forum that they are being asked to waive: while the need for employment is tangible and immediate, the value of a judicial forum for a potential future dispute is hypothetical and remote.

In addition to this overriding issue, the post-*Gilmer* cases reveal numerous other problems associated with predispute arbitration agreements. For example, many predispute arbitration provisions (such as the one at issue in this case) are vague and unclear about whether they in fact apply to statutory antidiscrimination claims.[12] They speak generally about "disputes relating to the terms and conditions of employment" or "disputes arising under this contract." Where it cannot be said with certainty that a contractual arbitration provision applies to statutory employment discrimination claims, the victimized employee cannot be held to have made a "knowing" waiver of his right to a judicial

[11] (...continued)
provision (which was imposed by an employer through an employee handbook or other document), as well as situations, like the present case, in which the arbitration provision was negotiated between an employer and a union as part of a collective bargaining agreement and, therefore, could not constitute a valid waiver, by the employee, of his individual statutory rights.

[12] See note 2, *supra*.

forum. *See Prudential Insurance Co. of America v. Lai*, 42 F.3d at 1305 (where employment contract did not describe the disputes the parties had agreed to arbitrate, plaintiffs "did not knowingly contract to forego their statutory remedies in favor of arbitration"); *Renteria v. Prudential Insurance Co. of America*, 113 F.3d 1104 (same); *cf. Fuentes v. Shevin*, 407 U.S. at 95 (emphasis in original)("a waiver of constitutional rights in any context must, at the very *least*, be clear").[13] Clarity may not be enough to save a predispute arbitration agreement if the other requirements of a valid waiver have not been met in any context. Ambiguity, standing alone, should be enough to condemn it.[14]

In other cases, courts have enforced mandatory arbitration provisions where employers have unilaterally imposed them on employees already on the job. *See, e.g., Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 833 (8th Cir. 1997) (enforcing arbitration clause contained in employee handbook issued four years after plaintiff began the job); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1469 (D.C.Cir. 1997)(enforcing arbitration agreement current employees were required to sign "in consideration of" continued employment). In these circumstances, as in the collective bargaining context, there has been no meaningful agreement by the employee, and any purported waiver of statutory rights should not be deemed voluntary.

[13] See note 6, *supra*.

[14] In some cases, either the mandatory arbitration provision itself, or provisions relevant to determining its scope, is not contained in the employment contract but instead may be found in some referenced documents. Often, these supplemental documents are not even provided to the employee at the time the contract is signed. *See, e.g., Prudential Ins. Co. v. Lai*, 42 F.3d at 1301; *Hooters of America, Inc. v. Phillips*, 1998 U.S. Dist. LEXIS 3962 (D.S.C. Mar. 12, 1998), at *56-57.

Additionally, lower courts have enforced contractual arbitration provisions imposed on employees by their employers under circumstances that leave no doubt that the arbitration "agreements" are in fact non-negotiable conditions of employment. *See, e.g., Great Western Mortgage Corporation v. Michele Peacock*, 110 F.3d 222, 224 (3d Cir.), *cert. denied*, __ U.S. __, 118 S.Ct. 299 (1997)(upholding arbitration provision where employee had been required to sign arbitration agreement before employer would consider her job application); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 933 (9th Cir. 1992)(same where employment application contained arbitration agreement).

Where an employee who lacks effective bargaining power has been compelled to sign a contract containing a nonnegotiable, boilerplate arbitration provision as a condition of employment, the acceptance of this provision by the employee should not be deemed a voluntary waiver of statutory rights. Otherwise, employers have been effectively given the unilateral power to opt out of the judicial enforcement scheme created by Congress to protect workers against employment discrimination. This result is worse than illogical. It creates an "inherent conflict" with the underlying purposes of both Title VII and the ADA, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1989), which provides a further reason to reject the broad reading of *Gilmer* that is now so prevalent in the lower courts.[15]

It is critical, therefore, that the lower courts carefully scrutinize the facts surrounding alleged agreements to arbitrate statutory claims. The burden of proof must fall squarely on the party asserting that the agreement constitutes a valid prospective waiver of the right to go to court. In none of the foregoing circumstances, and many more like them, can the employees be said to have knowingly, intelligently, and voluntarily relinquished their right to a judicial forum to adjudicate their statutory employment discrimination claims.

[15] Congress has twice recognized the fundamentally involuntary nature of such mandatory arbitration provisions in collective bargaining agreements and individual employment contracts alike when it enacted statutory provisions encouraging the *voluntary* use of alternative dispute resolution for statutory discrimination claims. *See* pp.23-24, *supra*.

D. Contrary To The Fourth Circuit Ruling, The Legislative History Of The Americans With Disabilities Act (And Related Civil Rights Statutes) Does Not Support Mandatory Arbitration Of Statutory Claims

In both the decision below and its prior decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d at 881-82, the Fourth Circuit Court of Appeals claimed to find support for mandatory arbitration of employment discrimination claims in the text and legislative history of the ADA and the 1991 Civil Rights Act. *See* Pet.App., at 5a (finding in ADA a "statutory preference for arbitration"); *Austin*, 78 F.3d at 881 ("The language of the statutes could not be any more clear in showing Congressional favor toward arbitration"). This is a gross misreading of these statutory provisions. In §12212 of the ADA and §118 of the Civil Rights Act, Congress endorsed voluntary agreements to submit employment disputes to arbitration, but only as a supplement to the statutory enforcement scheme.

The ADA was enacted to provide a "clear and comprehensive national mandate" to eliminate "various forms of discrimination," including employment discrimination, against people with disabilities. 42 U.S.C. §§12101(a)(5), (b)(1)(2). Section 513 of the ADA, 42 U.S.C. §12212, provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Because the ADA was enacted in 1990, the phrase "to the extent authorized by law" clearly refers to the law prevailing before this Court's 1991 decision in *Gilmer*. In that pre-*Gilmer* era, most lower courts had interpreted *Alexander* to bar any "prospective waiver" of the right to litigate a statutory employment discrimination claim, whether in a collective bargaining agreement or an individual employment contract. *See, e.g., Swenson v. Management Resources Int'l, Inc.*, 858 F.2d 1304, 1308-09 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989)("*Alexander* makes clear that Congress intended the right in employment discrimination cases to have access to judicial remedies to outbalance the federal policy favoring arbitration); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 229 (3d Cir. 1989); *Rosenfeld v. Dep't of the Army*, 769 F.2d 237, 239 (4th Cir. 1985)("The plain lessor on *Alexander* . . . is that Congress entrusted the ultimate resolution of questions of discrimination to the federal judiciary"); *Lyght v. Ford Motor Co.*, 643 F.2d 435, 439 (6th Cir. 1981); *Holley v. Seminole County School District*, 755 F.2d 1492, 1503 (11th Cir. 1985); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186-87 (1st Cir. 1989).

The judicial history is echoed in the legislative history of §12212, which further reinforces the conclusion that Congress intended to preclude involuntary waivers of the right to pursue ADA claims in court. The House Judiciary Committee report stated:

> "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this act . . . . [T]he approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and [the Committee] does not intend that the inclusion of [§12212] be used to preclude rights and remedies that would otherwise be available to persons with disabilities."

H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. at 76-77, *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500. This statement was expressly adopted in the House Conference report, which added "[i]t is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in *a collective bargaining agreement or employment contract* prevent an individual from pursuing their rights under the ADA." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. at 89, *reprinted in* 1990 U.S.C.C.A.N. 565, 598 (emphasis added).

A similar legislative history can be found in the 1991 Civil Rights Act. The Act was overwhelmingly adopted by Congress to promote two chief goals: to increase the remedies available under Title VII so that plaintiffs could for the first time be fully compensated for the injuries of discrimination, and to make enforcement of the Act more effective through substantive and procedural amendments that would make discrimination suits easier to bring and to prove. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1998 U.S. Dist. LEXIS 877, at *34 (thoroughly analyzing legislative history of the 1991 Civil Rights Act). The Act's legislative history reaffirms that "[i]n enacting Title VII, Congress intended to vindicate the substantial public interest in a discrimination-free workplace by encouraging private

citizens to enforce the statute's guarantees." H.R. Rep. No. 40(I), at 75, 102d Cong., 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 613.

Section 118 of the 1991 Civil Rights Act speaks directly to the issue of the arbitrability of Title VII claims, in language almost identical to that in the ADA: arbitration "is encouraged to resolve disputes . . . [w]here appropriate and to the extent authorized by law." Pub.L.No. 102-166 §118, 105 Stat. 1071, 1081 (1991)(codified as a historical and statutory note to 42 U.S.C. §1981). The House Reports on this section, drafted before *Gilmer*, make clear that §118 was not intended to encourage waivers of an injured employee's right to a judicial forum. Rather, they stress that "any agreement to submit disputed issues to arbitration, *whether in the context of a collective bargaining agreement or in an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 40(I), at 97; H.R. Rep. No. 40(II), at 41, *reprinted in* 1991 U.S.C.C.A.N. 694, 735 (emphasis added). Section 118, the Reports explain, is intended to be "consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*" *Id.* Echoing words taken directly from *Alexander*, Congress stated that the encouragement of alternative dispute resolution was meant to "supplement, not supplant" existing procedures, *compare Alexander*, 415 U.S. at 48, and should not be "used to preclude rights and remedies that would otherwise be available." H.R. Rep. No. 40(I), at 97; H.R. Rep. No. 40(II), at 41.[16]

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[16] Even before 1991, the civil rights laws were designed to facilitate employees' private enforcement actions by giving employees a choice of jurisdiction in federal or state court. *See, e.g.*, 29 U.S.C. §626(c)(1) (concurrent jurisdiction of federal and state courts for ADA claims). This Court has recognized that such "provisions for concurrent jurisdic-

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In addition to the express endorsement of *Alexander*, Congress provided further evidence of its intent to preclude mandatory arbitration by rejecting an amendment that would have encouraged the use of arbitration "in place of judicial resolution." Such agreements, the Education and Labor Committee explained, would have allowed employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints." H.R. Rep. No. 40(I), at 104, *reprinted in* U.S.C.C.A.N. 642. This "would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights . . ." *Id.* "American workers," the Committee concluded, "should not be forced to choose between their jobs and their civil rights." *Id.* The rejection of this amendment in favor of the final version of §118 provides "strong evidence" of Congress' intent. *See Thompson v. Thompson*, 484 U.S. 174, 185 (1988).

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[16] (...continued)

tion serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes[.]" *Gilmer*, 500 U.S. at 29, quoting *Rodrigues de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). To be sure, *Gilmer* stresses that arbitration "is consistent" with the flexibility such a concurrent jurisdiction provision affords, *id.*; but that is only the case if the arbitration agreement is truly *voluntary*. Where *Gilmer* is applied broadly to enforce an arbitration agreement imposed by the employer as a non-negotiable condition of employment, it is the *employer's* choice of forum that is enforced, and the employee-plaintiff's jurisdictional choice is restricted. Such a procedure stands the statutory scheme of broadening the plaintiff's jurisdictional choices on its head. In sum, whatever might be said for truly voluntary predispute arbitration agreements, arbitration provisions imposed on employees as a non-negotiable condition of employment are in inherent conflict with the civil rights laws' grant of jurisdictional choices to the employee.

Nor can it be argued that this Court's decision in *Gilmer*, after committee consideration of the bill but before final passage, affected congressional intent with regard to §118. In the House debate immediately prior to the Act's passage on November 7, 1991, post-*Gilmer*, the chair of the Judiciary Subcommittee on Civil and Constitutional Rights reiterated that §118 was "intended to be consistent with . . . *Alexander v. Gardner-Denver*," and added for good measure:

> This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer* . . . or any application or extension of it to Title VII.

137 Cong.Rec. H9505-01, *H9530 (November 7, 1991).

Indeed, one of the major purposes of the 1991 Civil Rights Act was to create a new jury trial right for Title VII plaintiffs. Before passage of the 1991 Civil Rights Act, most courts had concluded that Title VII plaintiffs had no right to a jury trial. *See, e.g., Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375 & n.19 (1979). In response, the 1991 Civil Rights Act explicitly recognized a right to a jury trial for victims of intentional discrimination in order to "protect the rights of all persons under the Seventh Amendment . . ." H.R. Rep. 40(II), at 29. It makes little sense to conclude, as the Fourth Circuit did, that Congress would have finally recognized this right in one section of the 1991 Act, only to empower employers in a different section of the same act, to avoid trial by jury -- and a judicial forum altogether -- by requiring employees to waive their rights and agree to arbitrate claims as a condition of employment. *Cf. Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997)(Posner, J.)("It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time . . . to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases").

Thus, the legislative history of the ADA and the 1991 Civil Rights Act support the position urged by *amici*. The provisions in those acts concerning arbitration and other forms of alternative dispute resolution were intended to supplement employees' rights to a judicial forum to adjudicate their claims. No mandatory arbitration provision should be construed to waive an employee's right to go to court, unless the court can find that the provision constitutes a knowing, intelligent, and voluntary waiver of that right by the individual rightholder.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Fourth Circuit Court of Appeals dismissing this action and remand the case for further proceedings.

Respectfully submitted,

Louis M. Bograd
(Counsel of Record)
American Civil Liberties Union
Foundation
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-1817

Steven R. Shapiro
Lewis Maltby
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

David S. Schwartz
ACLU Foundation of
Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

C. André Brummé III
ACLU of South Carolina Foundation
1338 Main Street
Columbia, South Carolina 29201
(803) 799-5151

Dated: May 7, 1998